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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN FRANCISCO

FLYING DISC INVESTMENTS LP, a Nevada limited partnership; CHRIS KITZE, a California resident; GEORGE GARRICK, a California resident; ROJASI VENTURE GROUP, LLC, a Delaware limited liability company; THE METEOR GROUP, LLC, a California limited liability company; CHARLES VALLONE, a New York resident; SETH STARR, a New York resident; and ALAN FRANKEL, a New York resident; FRANCIS JULIANO, a Virginia resident; JOHN BELCHERS, RUSSELL FRADIN, JAMES HEFFERNAN, HAROLD HUGHES, LINDA GRAEBNER, BARRY SCHULER and PETER EKMAN, all California residents.

**Plaintiffs,**

v.

BAKER COMMUNICATIONS FUND II, L.P., a New York limited partnership; BAKER COMMUNICATIONS FUND II (QP), L.P., a New York limited partnership; BAKER CAPITAL PARTNERS II, LLC, a New York limited liability company, as the general partner of the Baker Communications Funds; and DOES 1-20,

## Defendants.

## AND RELATED ACTION

Case No.: CGC 05447293

**FOURTH AMENDED COMPLAINT  
FOR:**

- (1) BREACH OF FIDUCIARY DUTIES;
  - (2) BREACH OF CONTRACT: IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING;
  - (3) UNJUST ENRICHMENT;
  - (4) FRAUD

**DEMAND FOR JURY TRIAL**

Complaint filed: December 2, 2005

### Case Nos

**FOURTH AMENDED COMPLAINT**

This action seeks recovery for fraud and breaches of fiduciary duties and the contractual covenant of good faith and fair dealing by defendants as the controlling shareholders of Wine.com, a Delaware corporation with its principal place of business in San Francisco, California. Plaintiffs are shareholders of Wine.com whose ownership rights and stake in that company were diminished while defendants' were increased as a result of defendants' misconduct. Plaintiffs, allege the following facts and causes of action in support of their claims for recovery:

## THE PARTIES

1. Plaintiff Flying Disc Investments LP ("Flying Disc") is a Nevada limited partnership with its principal place of business in Marin County, California. At various times relevant herein, Flying Disc owned preferred stock in Wine.com, including series D, E, F and G preferred stock as well as warrants which could be used to purchase additional shares of preferred or common stock.

2. Plaintiff Chris Kitze is a California resident who, at all times relevant herein, was a general partner of Flying Disc and as an individual also has owned preferred and common stock of Wine.com, including series D preferred stock and warrants to purchase additional shares of common and preferred stock.

3. Plaintiff The Meteor Group, LLC is a California limited liability company. At all times relevant herein it owned Series F preferred stock and warrants to purchase additional shares of preferred stock.

4. Plaintiff Harold Hughes is a California resident who, at all times relevant herein, owned preferred stock of Wine.com, including series D and series F stock and warrants to purchase additional shares of common and preferred stock.

5. Plaintiff Russell Fradin is a California resident who, at all times relevant herein, owned series F preferred stock in Wine.com and warrants to purchase additional shares of common and preferred stock.

6. Plaintiffs George Garrick, Peter Ekman, James Heffernan, Linda Graebner, Barry Schuler and John Belchers are California residents who, at all times relevant herein, owned

1 common stock of Wine.com and/or options to purchase additional shares of common stock.  
2 During 2004 and 2005, Mr. Garrick served as Chief Executive Officer of Wine.com, and  
3 Mr. Belchers served as its Chief Financial Officer. Mr. Ekman served as Chief Executive Officer  
4 of Wine.com immediately before Mr. Garrick.

5 7. Plaintiff RoJaSi Venture Group, LLC ("Rojasi") is a Delaware limited liability  
6 company with its principal place of business in New York, New York. At all times relevant  
7 herein, Rojas owned preferred stock in Wine.com, including series D and F preferred stock as  
8 well as warrants which could be used to purchase additional shares of preferred stock.

9 8. Plaintiffs Alan Frankel, Seth Starr and Charles Vallone are New York residents  
10 who, at all times relevant herein, owned preferred stock in Wine.com, including series E and F  
11 preferred stock as well as warrants which could be used to purchase additional shares of preferred  
12 stock.

13 9. Plaintiff Francis Juliano is a Virginia resident who, at all times relevant herein,  
14 owned options to purchase common stock of Wine.com.

15 10. One or more plaintiffs herein will assert claims both on their own behalf and in  
16 their capacity as assignees of claims that the assigning Wine.com stakeholders could have  
17 asserted herein against the same defendants based upon the same transactions and occurrences.

18 11. Defendants Baker Communications Fund II and Baker Communications Fund II  
19 (QP) (the "Baker Funds") are New York limited partnerships, with their principal place of  
20 business in New York, New York. At all times relevant herein, the Baker Funds owned, or were  
21 in the process of purchasing, preferred stock in Wine.com, including Series F and Series G  
22 preferred stock as well as warrants to purchase additional shares of preferred stock.

23 12. Defendant Baker Capital Partners II, LLC is a New York Limited Liability  
24 Company which at all times relevant herein has been the general partner of the Baker Funds.

25 13. Plaintiffs do not know the true names or legal capacities of the defendants sued  
26 herein as Does I through 20, inclusive, and therefore sue said defendants by such fictitious names.

27 14. Plaintiffs are informed and believe, and thereupon allege, that each of the  
28 defendants designated herein as a Doe is legally responsible in some manner for the misconduct

herein alleged, and is legally responsible in some manner for causing the injuries and damages to the plaintiffs as hereinafter alleged.

15. Plaintiffs are informed and believe, and thereupon allege, that each defendant whether specifically named or designated herein as a Doe, was the agent, representative, servant, employee, principal, joint venturer, co-conspirator, management company and/or representative of each of the remaining co-defendants, and in doing the acts hereinafter alleged, was acting within the course and scope of said agency, employment, joint venture, conspiracy, agreement, management company agreement or other relationship with the approval, knowledge, authority, permission and/or consent of the remaining defendants.

## JURISDICTION AND VENUE

16. This action falls within the unlimited civil jurisdiction of this Court because equitable relief is sought and the amount in controversy exceeds \$25,000 exclusive of interest, costs and attorneys' fees.

17. Venue is proper in this county under Section 395.5 of the Code of Civil Procedure because the obligations sued upon arose and were to be performed in the City and County of San Francisco. Defendants also committed fraud and breached their obligations to plaintiffs in San Francisco.

## **STATEMENT OF FACTS**

18. Wine.com is a privately held Delaware business corporation which was founded in the 1990's as eVineyard. Its principal business has always been internet sales of wine and related products. In common with most internet retail operations, Wine.com has experienced losses in each year of its operations while it was establishing a brand identity, improving the efficiency of its business operations and increasing its revenues and customer base. Therefore, it has required additional capital from time to time in order to continue in business.

19. By early 2004, the Wine.com management and Board of Directors had decided to seek additional capital necessary for the company to continue expanding its operations and increasing its revenues until all shareholders could realize a return on their investment either through a sale of the company or a public stock offering.

1           20. After full disclosure of the Wine.com business plan and financial condition,  
2 followed by extensive due diligence, Wine.com reached an agreement with defendants in August  
3 2004 whereby defendants would pay \$17 million for about 86% of a new class of preferred stock,  
4 designated as Series F. At defendants' insistence, their purchase of Series F preferred stock was  
5 based upon an assumption that the entire company was worth only about \$22 million on the date  
6 of defendants' investment.

7           21. In connection with their purchase of Series F stock, defendants also insisted upon,  
8 were given, and exercised effective control over the board of directors and over all important  
9 corporate decisions pursuant to a written Shareholders' Agreement and a Fourth Amended and  
10 Restated Certificate of Incorporation (true and correct copies of which are attached hereto as  
11 Exhibits A and B). Under the terms of those documents, defendants could:

12           A. Elect two of the seven members of the Board of Directors (referred to in  
13 the Restated Certificate as the "Baker Directors";

14           B. Require all important corporate decisions and actions to be approved in  
15 advance by both the Baker directors and defendants as shareholders, including any decision to sell  
16 or merge the company, issue additional stock (except upon the exercise of outstanding stock  
17 options or warrant rights), incur new debts in excess of \$250,000, approve the annual budget of  
18 the company or permit any "material departure" from the terms of that budget, hire, or fire any  
19 member of "senior management", or nominate any person to serve on the Board of Directors.

20           22. In the event of a sale or merger approved by defendants, they were also given the  
21 power to force all other shareholders to "come-along" and accept any such transaction approved  
22 by a majority of the Board of Directors.

23           23. Representatives of Wine.com and its shareholders who were involved in  
24 negotiations with defendants' representatives in 2004 raised concerns about the scope and nature  
25 of the controls that defendants were demanding and the potential for abuse if defendants used the  
26 powers they were seeking in a manner that was inconsistent with the interests of the other  
27 shareholders or the company as a whole. Defendants' representatives (principally Mr. Joseph  
28 Saviano and Mr. Jonathan Grabel) responded to those concerns by assuring the Wine.com

1 management and shareholders that the contractual controls defendants were insisting upon were  
2 standard for all similar investments by defendants, were rarely used, and would never be used in a  
3 manner contrary to the interests of the company and all of its shareholders. Mr. Saviano  
4 reinforced these assurances with a comment that while defendants and the Wine.com  
5 management and shareholders may be “on opposite sides of the table” when the terms of the  
6 Series F investment were being negotiated, everyone would be “on the same side of the table”  
7 after defendants became Wine.com shareholders.

8       24. However, defendants intentionally concealed information known to them which  
9 would have been material to the shareholders and management of Wine.com because it would  
10 have raised serious questions about the truth of defendants’ assurances. Specifically, defendants  
11 did not disclose that on a number of occasions before mid-2004, when they had invested in other  
12 closely-held private companies like Wine.com, defendants had used their control over those  
13 companies to further their own self-interest at the expense of the interests of all other  
14 shareholders. Specific cases involving such conduct prior to mid-2004 include the following:

15           A. In 2001, Defendants invested in a closely-held private company named  
16 OP40 through an initial purchase of preferred stock which represented about 30% of the  
17 company, but they demanded and received contractual rights to control all corporate affairs  
18 similar to the situation in Wine.com. Those controls were first used by defendants to replace the  
19 CEO who was a company founder. After the CEO installed by defendants spent all of the capital  
20 available to the company, they refused to allow the company to acquire additional capital from  
21 any other source and demanded more than 80% of the company as a condition for refinancing on  
22 terms favorable to defendants. When the other shareholders protested, defendants demanded that  
23 all of the company assets be transferred to their ownership, including valuable patent rights. The  
24 company was forced into bankruptcy as a result of this standoff between defendants and the other  
25 shareholders of OP40, who have charged defendants with abusing their right to control corporate  
26 affairs in order to serve their own interests at the expense of all other shareholders. This battle  
27 between defendants and OP40 shareholders was ongoing in 2004 when defendants purchased  
28 their interest in Wine.com without disclosing anything about the OP40 dispute.

1                   B.     In 1997, defendants invested in another closely held private company  
2 named Virtual Resources. When Virtual Resources needed additional funds to finance its  
3 operations, defendants used the controls they had obtained in connection with their minority  
4 ownership investment to preclude any sale or financing from other sources. They then squeezed  
5 out the other shareholders through self-dealing refinancings until defendants owned essentially all  
6 of the equity in Virtual Resources. The company was then sold by defendants in 1999.

7                   25. During the negotiations in mid-2004, defendants provided the Wine.com  
8 representatives with what purported to be a “representative list” of Chief Executive Officer  
9 references from other companies where they made similar investments. That list did not include  
10 any references to the CEOs or other representatives of OP40, Virtual Resources or any other  
11 companies where defendants abused their power to control corporate affairs to serve their own  
12 interest at the expense of all other shareholders. Defendants intentionally omitted any references  
13 to investments in companies where those issues were raised because defendants did not want  
14 Wine.com or its representatives to discover defendants’ true intentions with respect to their  
15 investment in Wine.com.

16                  26. Prospective buyers and sellers of any significant block of stock in a privately held  
17 corporation like Wine.com invariably conduct extensive “due diligence” which is aimed, in part,  
18 at determining whether the prospective buyer, the company management, and the existing  
19 shareholders have investment goals that are sufficiently compatible to minimize the risk of  
20 disagreement over important corporate decisions. One of the most important aspects of that  
21 exercise for privately held companies pioneering a new business like Wine.com is determining  
22 whether the parties have compatible views on their investment goals, usually in the form of an  
23 Initial Public Offering, or a sale or merger involving a larger company for cash or marketable  
24 stock that can be converted into cash. The mutual “due diligence” exercise preceding the sale of  
25 the Series F preferred stock to defendants involved extensive meetings, document review and  
26 other contacts over the span of about three months in mid-2004. In the course of those contacts,  
27 the Wine.com representatives were assured by defendants’ representatives, including Mr. Saviano  
28 and Mr. Grabel, that both sides had common investment goals that would permit all shareholders

1 to realize the best return on their investment available in the market whenever a suitable  
2 acquisition or IPO became available. The due diligence conducted by Wine.com representatives  
3 also involved a review of the information and statements made on the website for defendant  
4 Baker Capital Partners, which included statements about the general principles allegedly followed  
5 by Baker Capital Partners in managing the investments of defendants, all of which were  
6 consistent with the other assurances given by defendants' representatives concerning the  
7 investment goals they shared with all other Wine.com shareholders and their intention to exercise  
8 all corporate controls in a manner which served the best interests of the company and all of its  
9 shareholders. The website representations indicated that during the "post investment process"  
10 Baker would "[o]rganize[] subsequent rounds of equity or debt and vendor financing" and help  
11 "[o]rganize[] a sale or IPO of the company." (A true and correct copy of these statements from  
12 the Baker website, <http://www.bakercapital.com>, is attached hereto as Exhibit D.)

13       27. However, in giving assurances and making representations concerning their  
14 investment intentions to Wine.com representatives in 2004, defendants deliberately concealed  
15 information known to them that would have been material to the shareholders and management of  
16 Wine.com because it would have raised serious questions about the truth of defendants'  
17 assurances and representations. Specifically, in addition to their history of abusing their power to  
18 control corporate affairs at the expense of other shareholders in similar investments, defendants  
19 did not disclose that both of the defendant Baker Funds were substantially "underwater" when the  
20 Wine.com investment was made, meaning that the value of the assets held by those funds was  
21 substantially below what the limited partners had invested. If the Wine.com representatives had  
22 known that critical fact, they would have understood that Baker Capital Partners, as manager of  
23 the defendant Baker Funds, had little or no financial incentive to obtain a reasonable return on the  
24 Baker Funds' investment in Wine.com, because even a high percentage return on that investment  
25 in the short term would not have brought the Baker Funds back "above water," where there were  
26 overall profits for Baker Capital Partners to share with the Limited Partners. However, Baker  
27 Capital Partners did have a direct financial incentive to continue investing money from the Baker  
28 Funds in Wine.com, because each year they were paid a fee calculated as a percentage of the total

1 amount of money contributed by the limited partners which was actually invested in companies  
2 like Wine.com.

3       28. As a result of this concealed information concerning the status of the Baker Funds  
4 in 2004 and the special financial incentives for Baker Capital Partners as manager of those funds,  
5 the representatives of Baker Capital Partners who handled all contacts with Wine.com  
6 representatives prior to the sale of Series F shares to defendants in 2004 knew that defendants'  
7 investment in Wine.com would be managed in accordance with investment goals that were  
8 inconsistent with the interests of all other Wine.com shareholders. Rather than seeking and being  
9 prepared to follow any exit opportunity which provided a reasonable return on the investment of  
10 all shareholders based upon an objective assessment of the actual value and overall prospects of  
11 the company when any exit opportunity was presented, the Baker Capital Partners (who  
12 controlled all decisions on behalf of defendants) were motivated to continue to invest additional  
13 funds in Wine.com unless and until they found an exit opportunity which produced a return equal  
14 to many times the amount that was invested. This "high risk gambler" investment strategy of  
15 defendants was a material fact that was intentionally concealed from the shareholders and  
16 management of Wine.com during the negotiations leading up to the Series F stock purchase.

17       29. In each of the respects described above, defendants misrepresented to Wine.com  
18 and its shareholders how they intended to manage their investment in Wine.com and use the  
19 controls over its corporate affairs which they insisted upon being given in connection with that  
20 investment. Defendants also intentionally concealed material facts concerning their track record  
21 in similar situations and their unique motivation to treat the Wine.com investment as a high risk  
22 gamble. Without those disclosures, the representations and assurances made by defendants were  
23 materially false and misleading.

24       30. Before defendants purchased Series F preferred stock in 2004, Wine.com had  
25 opportunities to obtain the same amount of financing from other investors who truly shared the  
26 investment goals of the other Wine.com shareholders and who did not have a record of abusing  
27 their powers as controlling shareholders in similar situations. Wine.com and its shareholders  
28 would never have agreed to sell Series F preferred stock or any other controlling interest in

1 Wine.com to defendants if they had known the true facts concerning defendants' investment  
2 intentions and track record of abusing their position as controlling shareholders in similar  
3 situations.

4       31. As a result of their powers under the 2004 Series F Shareholders' Agreement and  
5 related amendments to the company's Certificate of Incorporation, and the actual exercise of  
6 those powers, defendants became "controlling shareholders" of Wine.com, and owed fiduciary  
7 obligations to both the company and all of its other shareholders which required defendants to  
8 exercise those powers in a manner that would preserve and protect the interests of all shareholders  
9 and other stakeholders in the company. Defendants' fiduciary duties also required them to  
10 exercise the utmost good faith and fairness in all of their dealings with the company and its  
11 stakeholders.

12       32. Because defendants would become controlling shareholders of Wine.com under  
13 the terms they proposed in 2004, they had a duty to disclose to the company and its shareholders  
14 any and all material facts relevant to a determination of whether the proposed arrangement was in  
15 the best interests of the company and its shareholders. Defendants breached their duty by  
16 willfully failing to disclose that, in a number of similar investments where they were given  
17 similar controls over company finances and operations, defendants had been accused of breaching  
18 their fiduciary duties as directors or controlling shareholders by abusing their power to control  
19 company financing and operations to the detriment of other shareholders. Specifically, the Baker  
20 defendants were accused of such breaches for their misconduct in blocking companies they  
21 controlled from seeking or obtaining financing from other sources until those companies were on  
22 the verge of bankruptcy, then "cramming down" self-dealing refinancings or asset sales on  
23 onerous terms which gave defendants unfair advantages over other shareholders in their  
24 respective ownership percentages and rights.

25       33. If defendants had disclosed to plaintiffs material information concerning the  
26 claims of fiduciary breaches raised by shareholders in other companies where defendants had  
27 used their position as controlling shareholders to force onerous self-dealing refinancings and  
28 other transactions upon those companies and their shareholders, plaintiffs would-not have agreed

1 to any transaction which gave defendants the powers described in paragraphs 21 and 22 above.

2       34. After a careful review of Wine.com's business and prospects in early 2005, the  
3 Board of Directors and management unanimously concluded that it was in the best interests of the  
4 company and its stakeholders to explore all reasonable alternatives for a sale of the company  
5 within a matter of months if possible. For that purpose, and with the approval of defendants, the  
6 Board of Directors retained an investment banking firm (S.G. Cowen) to identify and solicit  
7 prospective buyers.

8       35. A number of companies expressed some interest in acquiring Wine.com during  
9 early 2005. Liberty Media ("Liberty") was identified by the investment bankers and management  
10 as the best prospect because Liberty is a large public company with an excellent reputation,  
11 billions of dollars in assets, a highly liquid stock, and a business platform that could make the  
12 highest and best use of Wine.com's assets. In May 2005, the company received a written  
13 proposal referred to by plaintiffs and defendants at the time as a "Letter of Intent," from Liberty,  
14 which offered to purchase Wine.com for \$75 million in Liberty stock that could be registered and  
15 made immediately saleable on the New York Stock Exchange shortly after any transaction closed.  
16 This initial Liberty offer was refined as a result of extensive due diligence by Liberty and  
17 confirmed in a second proposal, also referred to by all parties as a Letter of Intent, which removed  
18 some conditions of a sale and revised the purchase price to \$67.5 million. (A true and correct  
19 copy of that Letter of Intent is attached as Exhibit C.)

20       36. The Wine.com management and S.G. Cowen as its investment bankers advised the  
21 Board of Directors of their opinions that the second Liberty Letter of Intent proposed a  
22 transaction that would serve the best interests of the company and all of its stakeholders. After  
23 receiving that recommendation, the Board of Directors (including one Baker director; the other  
24 being absent) unanimously approved the second Liberty Letter of Intent and authorized  
25 management and the investment bankers to conclude a sale on those terms. Before that could be  
26 done, however, defendants announced that they were exercising their "blocking rights" under the  
27 Shareholders Agreement to preclude any sale or merger with Liberty on the terms proposed.  
28 Defendants also relied upon the same blocking rights to stop subsequent efforts by management

1 and the non-Baker directors to salvage the opportunity for a sale to Liberty on similar or more  
2 favorable terms. As a practical matter, defendants' actions in blocking the Liberty sale also made  
3 it impossible for the management and investment bankers to obtain equal or better sale terms  
4 from any other prospective buyer. Defendants' actions in foreclosing any beneficial sale of the  
5 company during 2005 were directed by Baker Capital Partners II as the general partner of the  
6 Baker Funds in part because so long as the Baker Funds continued to hold or increase their  
7 investment in Wine.com, Baker Capital Partners II would continue to earn and receive  
8 management fees from the fund investors based upon the amount of that investment. The Baker  
9 directors supported those actions despite their initial vote in favor of the Liberty sale.

10       37. When they blocked any opportunity for a sale to Liberty, defendants knew that  
11 Wine.com only had financial resources sufficient to continue operations for a matter of weeks.  
12 Defendants also knew that they could use their power as controlling shareholders to prevent the  
13 company from obtaining additional funds (whether through borrowing money or selling stock)  
14 from any source other than defendants. That meant defendants could take advantage of their  
15 position as controlling shareholders to increase their percentage ownership of Wine.com at the  
16 expense of other shareholders in return for providing the additional funds necessary to avoid  
17 bankruptcy, just as they had in prior situations where they were controlling shareholders of other  
18 companies. Defendants also knew that they could use their power to ensure that any additional  
19 investment they might make in Wine.com would be very secure by also forcing the other  
20 shareholders to accept an increase in defendants' rights to preferential treatment in the event of  
21 any sale or other liquidation of the company or its business (commonly referred to as "liquidation  
22 preferences.").

23       38. Defendants took further undue advantage of their position as controlling  
24 shareholders by refusing to permit the company to obtain the financing it needed in mid 2005  
25 from any of the other sources identified by a special committee of the Board of Directors and the  
26 investment bankers. Defendants then stalled presentation of their own financing proposal until  
27 the company was within a week of being forced to declare bankruptcy. Ultimately, defendants  
28 successfully used such improper financial pressures in the same manner as they had with other

1 companies to coerce the Wine.com Board and other shareholders into acquiescing in a  
2 "reorganization" in August 2005 on terms dictated by defendants and unfair to plaintiffs. Those  
3 terms included the following:

4           A.       The sale to defendants of more than 14 million shares of a new series (G)  
5 of preferred stock, with rights superior to all other forms of common or preferred stock previously  
6 issued by the company, based upon a price that assumed the overall value of the company in  
7 August 2005 was somewhere between one half and one fifth of the value established by the  
8 Liberty proposals and letters of intent only three months earlier;

9           B.       An increase in the amount of liquidation preferences defendants would  
10 have over all other shareholders from the previous level of \$17 million to at least \$27 million; and

11           C.       Reconstitution of the Board of Directors to reduce the number of directors  
12 to three—the two sitting Baker directors and one more director who would also be elected by  
13 defendants as a result of the increase in their overall ownership of the equity in Wine.com from  
14 about 40% at the time of the Liberty letter of intent to nearly 70% after the reorganization.

## 15                   **FIRST CAUSE OF ACTION**

### 16                   **(Breach of Fiduciary Duties Against All Defendants)**

17           39.      Plaintiffs incorporate Paragraphs 1 through 38 as though fully set forth herein.

18           40.      As controlling shareholders that actually exercised effective control over the board  
19 of directors and the company, defendants owed fiduciary duties to plaintiffs.

20           41.      The fiduciary duties owed by defendants to plaintiffs and other Wine.com  
21 shareholders required them to use their power to control and manage Wine.com's affairs in a  
22 manner that would benefit the company and all of its stakeholders, including the plaintiffs, and to  
23 refrain from abusing their position and powers in order to enrich themselves at the expense of  
24 Wine.com and the other stakeholders, including plaintiffs.

25           42.      Each of the defendants violated their fiduciary duties of care, loyalty and good  
26 faith when they blocked the Liberty sale that would have been extremely beneficial to all  
27 stakeholders, then used their power over the company and their knowledge of its financial  
28 vulnerability to extract a larger share of ownership and other rights in the company at the expense

1 of the ownership shares and rights of all other stakeholders.

2       43. Specifically, defendants breached their fiduciary duties by, among other things:

3           A. Failing to disclose to Wine.com and its shareholders any and all material  
4 facts relevant to a determination of whether the proposed arrangement between the defendants  
5 and Wine.com was in the best interests of Wine.com and its shareholders;

6           B. Abusing their powers as controlling shareholders in order to seize a greater  
7 share of the company at the expense of the plaintiffs and all other stakeholders. (For example, if  
8 the Liberty proposal and letter of intent had been accepted and the net distribution to all equity  
9 holders of Wine.com was approximately \$65 million, defendants would only have received  
10 about \$31 million from that transaction for their share in the company before the Series G  
11 reorganization. After that reorganization on terms which defendants forced upon the other  
12 shareholders, defendants' share of any distribution from a similar sale and distribution increased  
13 to more than \$43 million.); and

14           C. Blocking the company from obtaining essential operating funds through  
15 other sources in order to ensure that defendants could be the sole providers of the financing  
16 necessary to save the company from bankruptcy after they had blocked the sale to Liberty, then  
17 using the coercion of a threatened bankruptcy to force the other shareholders to acquiesce in  
18 unfair financing terms that were extremely favorable to defendants, including purchase of the  
19 most senior preferred shares (Series G) at a price of \$.62 per share within a month after they  
20 vetoed the Liberty offer which would have paid more than \$4.00 per share for lesser preferred  
21 shares (Series E and F), and nearly \$2.00 per share for Series D preferred or common stock with  
22 no preferred rights. Further, after the Series A-1 refinancing, the same shares that would have  
23 been worth \$4.00 had the sale of Wine.com to Liberty gone through are now worth a fraction of a  
24 cent based upon defendants' valuation of the company.

25       44. As a direct and proximate result of defendants' breach of fiduciary duties,  
26 plaintiffs have and will continue to suffer substantial damage which includes, but is not limited to  
27 the following:

28           A. Plaintiffs no longer have any representation on the Board of Directors or

1 other ability to influence important corporate decisions except those which require the consent of  
2 all or nearly all shareholders, because only defendants have the power to nominate and elect  
3 directors and they have exercised that power so that the only three directors of the company at  
4 this time are Rob Manning, a partner at Baker Capital Partners; Rich Bergsund, the Wine.com  
5 CEO who was hired and appointed by the defendants; and Peter Eklund, an outside director also  
6 appointed by defendants.

7 B. Plaintiffs have lost any opportunity to sell or otherwise realize any value  
8 remaining in their shares except upon terms and timing which defendants consider to be in their  
9 own best interests, whether or not those interests coincide with those of the other stakeholders in  
10 the company;

11 C. Defendants have gained sufficient voting control of the company to require  
12 the company to obtain all additional capital from defendants and thereby force even greater  
13 dilutions of the interests of all other shareholders in exchange for providing the capital which will  
14 be required to fund the company's continuing losses from operations conducted completely under  
15 defendants' control; and

16 D. Defendants already have usurped some or all of the amounts which  
17 plaintiffs would have received for their shares in the company in the event of an early sale or  
18 liquidation. (For example, if the company were sold today for \$40 million, nearly every dollar  
19 from that sale would go to defendants. Currently, defendants would receive about 99% of  
20 liquidation preference amounts paid to all preferred shareholders in the event of a \$40 million sale  
21 and 99% of any remaining proceeds. A sale at the same price before defendants' misconduct  
22 would have produced almost \$10 million for distribution among the owners of common and  
23 preferred stock after all preferred stock liquidation preferences were satisfied.) Further, after the  
24 Series A-1 refinancing, the same shares that would have been worth \$4.00 had the sale of  
25 Wine.com to Liberty gone through are now virtually worthless based upon defendants' valuation  
26 of \$120,000 for the entire company. In addition, the shares have been subject to a 99% dilution  
27 with the issuance of the new shares.

28 45. Defendants' conduct as described herein involves acts of oppression, fraud or

1 malice such that exemplary damages are necessary and appropriate to deter defendants and others  
2 from engaging in similar conduct in the future.

3 **SECOND CAUSE OF ACTION**

4 **(Breach of the Implied Covenant of Good Faith and Fair Dealing**

5 **Against the Baker Fund Defendants)**

6 46. Plaintiffs incorporate Paragraphs 1 through 45 as though fully set forth herein.

7 47. Defendants' actions breached the covenant of good faith and fair dealing implied  
8 in the Shareholders' Agreement by taking advantage of their position as controlling shareholders  
9 to advance their own self interest by depriving plaintiffs and other Wine.com shareholders of the  
10 benefits of the bargain embodied in the Shareholders' Agreement and by taking actions which  
11 were unfair and unreasonably disadvantageous to plaintiffs and other Wine.com shareholders. As  
12 either direct parties to, or intended beneficiaries of the 2004 Shareholders' Agreement, plaintiffs  
13 and other Wine.com shareholders had a reasonable expectation that the powers given to  
14 defendants under that agreement would be exercised in a reasonable and fair manner and in good  
15 faith to advance the interests of all stakeholders in the company; and not to increase defendants'  
16 ownership interest in and control over the company at the expense of some or all other  
17 stakeholders. By violating that reasonable expectation through the misconduct alleged herein,  
18 defendants breached their contractual obligations to plaintiffs.

19 48. Plaintiffs were damaged by defendants' breach in the manner alleged above, and  
20 defendants were unjustly enriched by the same breach.

21 **THIRD CAUSE OF ACTION**

22 **(Unjust Enrichment Against All Defendants)**

23 49. Plaintiffs incorporate paragraphs 1 through 48 as though fully set forth herein.

24 50. Defendants' misconduct as alleged above was intended to and did unjustly enrich  
25 defendants at the expense of all other stakeholders in Wine.com by violating the fiduciary and  
26 contractual duties defendants owed to those stakeholders and coercing them to acquiesce in the  
27 refinancing terms which consummated defendants' unjust enrichment, in order to save the  
28 company from bankruptcy.

## **FOURTH CAUSE OF ACTION**

**(Fraud Against All Defendants)**

51. Plaintiffs incorporate paragraphs 1 through 50 as though fully set forth herein.

52. The principal representative of Wine.com and its shareholders in negotiations with defendants' representatives in July and August 2004 in connection with their potential purchase of the Series F preferred stock was Chief Executive Officer, George Garrick ("Garrick"). The principal representative of defendants was Saviano. Grabel also represented defendants and participated in numerous negotiating sessions. Saviano and Grabel met with Garrick, Russell Fradin ("Fradin"), Chris Kitze, Francis Juliano and others in New York in early July, 2007. Garrick, Fradin and from time to time others met with Saviano and Grabel in San Francisco numerous times during July and August as well as by telephone during this period.

53. Garrick raised concerns during meetings with Saviano and Grabel about the scope and nature of the controls that defendants were demanding as alleged in paragraphs 21 through 23 above and the potential for abuse if defendants used the powers they were seeking in a manner that was inconsistent with the interests of the other shareholders or the company as a whole. Saviano and Grabel responded to those concerns by representing to Garrick that the contractual controls defendants were insisting upon were standard for all similar investments by defendants, were rarely used, and would never be used in a manner contrary to the interests of the company and all of its shareholders.

54. During the negotiations, Saviano also represented to Garrick, Fradin and others that while defendants and the Wine.com management and shareholders may be “on opposite sides of the table” while the terms of the Series F investment were being negotiated, they would be “on the same side of the table” after defendants became Wine.com shareholders. Saviano also represented that defendants had common investment goals with existing shareholders of Wine.com. Saviano made such representations during the negotiating sessions referenced above during July and August 2004.

55. Saviano made these representations to Garrick, as the principal representative of Wine.com, its individual shareholders and its management team, knowing that those

1 representations in words or substance would be conveyed to all interested parties, including other  
2 plaintiffs. Defendants' representations and assurances as alleged above were repeated in  
3 discussions and various telephone conversations and other meetings prior to the closing of the  
4 F Series preferred stock. The representations were made in order to induce Wine.com to sell, and  
5 the shareholders to approve, a significant equity interest in the company to defendants and for  
6 defendants to obtain control over all important corporate decisions of Wine.com that could be  
7 used to serve defendants' own interests at the expense of other shareholders.

8       56. Defendants' representations were false or misleading in light of defendants'  
9 undisclosed intentions and other undisclosed material facts Saviano and Grabel knew were  
10 unknown to Garrick, the other plaintiffs or other shareholders of Wine.com. Those  
11 representations and the undisclosed facts that rendered them false or misleading include the facts  
12 alleged in paragraphs 24 through 29 and 32 through 33 above, including:

13           A. While Saviano represented that the blocking rights defendants sought were  
14 rarely used and that defendants did not intend to use them to the detriment of the other  
15 shareholders of the company, he failed to disclose defendants' track record of similar investment  
16 situations where defendants had used similar contractual provisions to engage in self-dealing to  
17 the detriment of the companies and their other shareholders, possibly including other companies  
18 in addition to those identified in paragraph 24 that are not yet known, and failed to disclose  
19 defendants' intent to use those provisions at Wine.com to advance their own interests to the  
20 detriment of the company and its shareholders if it suited their purposes to do so for their own  
21 benefit.

22           B. While Saviano or Grabel provided a "representative list" of CEO's from  
23 other companies in which defendants had invested, they omitted from that list any CEO's of  
24 companies where defendants had used similar controls to the detriment of the shareholders and  
25 had been accused of breaching their fiduciary duties by engaging in self-dealing or other  
26 corporate abuses.

27           C. While Saviano represented that defendants had the same investment goals  
28 as other Wine.com shareholders, he failed to disclose that in mid-2004, both of the defendant

1 Baker Funds were substantially “underwater” and because of that situation and the financial  
2 incentives of Baker Capital Partners in managing the Funds, defendants did not have the same  
3 investment goals for Wine.com as all other shareholders and in fact defendants’ true investment  
4 goals for the Wine.com investment were inconsistent with those of all other shareholders. Nor  
5 did Saviano disclose that defendants’ were willing to risk bankruptcy for Wine.com to force it to  
6 accept further financing from defendants on extremely unfavorable terms so that defendants could  
7 obtain a return equal to many times the amount of their investment, a return that could only be  
8 realized by squeezing out the other shareholders and thereby capturing their share of the proceeds  
9 from any sale or IPO which otherwise would have gone to those shareholders. Saviano and  
10 Grabel knew that if Garrick had known these critical facts, he would have understood and  
11 communicated to other plaintiffs and other stakeholders that Baker Capital Partners, as manager  
12 of the defendant Baker Funds, had little or no financial incentive to accept a reasonable return on  
13 the Baker Funds’ investment in Wine.com and that they would not approve any reasonable sale or  
14 IPO that did not provide an extraordinary profit to them even if such a sale or IPO was in the best  
15 interests of Wine.com and even if other stakeholders interests were substantially diluted or  
16 rendered worthless.

17       57. Defendants knew and intended that the representations of Saviano to Garrick,  
18 Fradin and others present at the meetings or telephone communications would be conveyed in  
19 words or substance to, and relied on by, other directors and stakeholders of Wine.com, including  
20 plaintiffs, and were made to induce plaintiffs, Wine.com’s Board of Directors and its shareholders  
21 to approve the sale of F Series preferred stock to defendants and to approve the contractual  
22 controls defendants were demanding. Plaintiffs relied directly or indirectly on the representations  
23 made by Saviano and Grabel in approving the investment by defendants in Wine.com. Had  
24 plaintiffs known information which neither Saviano nor Grabel disclosed, they would not have  
25 agreed to approve defendants’ investment or granted the rights to defendants identified in  
26 paragraphs 21 and 22 above.

27       58. Contrary to defendants’ representations of cooperation and mutual interests,  
28 defendants also intended to prevent the company from raising any additional capital from sources

1 other than defendants. Defendants intended to use the powers obtained through their  
2 misrepresentations and assurances alleged above to squeeze out the existing shareholders to take  
3 control of the company and deprive shareholders of the value of their equity interests. In fact,  
4 defendants intended to increase their control and preferences to deprive all other shareholders in  
5 Wine.com of the value of their equity in favor of themselves, contrary to their representations, by  
6 refusing to allow any other source of financing and by obtaining unreasonable financing terms for  
7 themselves to the detriment of plaintiffs and other shareholders. Had plaintiffs known of  
8 defendants' intentions, and that defendants did not intend to act in the best interests of the  
9 company and its existing shareholders as they represented and promised to do, plaintiffs would  
10 not have approved the sale of Series F preferred stock to defendants or approved the controls they  
11 demanded, but instead would have pursued financing from other interested and available sources.

12 59. The affirmative representations and assurances made by Saviano and/or Grabel  
13 about their intentions and business practices were false or misleading in light of the facts and  
14 intentions they failed to disclose as alleged above. Not knowing the true facts or defendants' true  
15 intentions, plaintiff Flying Disc LP and some of the other plaintiffs invested funds in Wine.com in  
16 2004 and thereafter in reliance on defendants' representations concerning their commitment to  
17 Wine.com and its shareholders and their representation that they did not intend to, and would not,  
18 take any actions that were not in the best interest of the company and its existing shareholders as  
19 alleged above.

20 60. By reason of the foregoing, and as a proximate result thereof, plaintiffs have  
21 suffered damages in an amount to be proven at trial.

22 61. Defendants' conduct as described herein involves acts of oppression, fraud or  
23 malice such that exemplary damages are necessary and appropriate to deter defendants and others  
24 from engaging in similar conduct in the future.

25 **PRAYER FOR RELIEF**

26 WHEREFORE, plaintiffs pray for the Court to award the following relief against  
27 defendants:

28 1. General and special damages sufficient to compensate plaintiffs for all economic

injury, including the diminished value of each plaintiffs ownership interest in the company (including the ownership interests for which claims were assigned to any of the plaintiffs) as a result of the defendants' blocking of the Liberty sale and the subsequent Series G and A—1 refinancings and reorganizations they forced upon the company and its shareholders;

2. Punitive damages in such amount as the court or the jury may award;

3. Appropriate equitable relief to cancel and set aside all rights and advantages gained by the defendants through the Series G and A—1 refinancings and reorganizations they forced upon the company and its shareholders; and

4. For such other and further relief as this Court deems just and proper.

## JURY DEMAND

Plaintiffs demand a trial by jury of all issues triable by a jury.

DATED: December 21, 2007

SHARTSIS FRIESE LLP

By: MARY JO SHARTSIS

Attorneys for All Plaintiffs  
Flying Disc Investments LP, Chris Kitze,  
George Garrick, RoJaSi Venture Group, LLC,  
The Meteor Group, LLC, Charles Vallone,  
Seth Starr, Alan Frankel, Francis Juliano, John  
Belchers, Russell Fradin, James Heffernan,  
Harold Hughes, Linda Graebner, Barry Schuler  
and Peter Ekman

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**PROOF OF SERVICE**

1, Virginia A. Kiley, declare:

1 am a citizen of the United States and employed in the City and County of San Francisco,  
California by Shartsis Friese LLP at One Maritime Plaza, Eighteenth Floor, San Francisco,  
California 94111. I am over the age of eighteen years and am not a party to the within-entitled  
action.

On December 21, 2007, at Shartsis Friese LLP located at the above-referenced address, I  
served on the interested parties in said cause a copy of the within document(s):

**FOURTH AMENDED COMPLAINT FOR: (1) BREACH OF  
FIDUCIARY DUTIES; (2) BREACH OF CONTRACT;  
IMPLIED COVENANT OF GOOD FAITH AND FAIR  
DEALING; (3) UNJUST ENRICHMENT; (4) FRAUD**

**FOURTH AMENDED DERIVATIVE COMPLAINT FOR:  
(1) BREACH OF FIDUCIARY DUTIES; (2) BREACH OF  
CONTRACT: IMPLIED COVENANT OF GOOD FAITH  
AND FAIR DEALING; (3) UNJUST ENRICHMENT;  
(4) FRAUD; (5) VIOLATION OF CAL. CORP. CODE § 25401**

- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid in accordance with the firm's practice, of which I am familiar, of collection and processing correspondence for mailing on the same day to the person(s) at the address(es) set forth below:
- by consigning the document(s) listed above to an express delivery service for guaranteed delivery on the next business day to the person(s) at the address(es) set forth below:
- by personal delivery by messenger service of the document(s) above to the person(s) at the address(es) set forth below:
- by facsimile transmission pursuant to Rule 2008 of the California Rules of Court on this date before 5:00 p.m. (PST) of the document(s) listed above from sending facsimile machine main telephone number (415) 421-2922, and which transmission was reported as complete and without error (copy of which is attached), to facsimile number(s) set forth below: ( by agreement /  not by agreement)
- by electronically delivering the document(s) listed above pursuant to federal and local rules of the court on this date from electronic address sflaw.com, and which transmission was reported as complete and without error, to electronic mail address(es) set forth below:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 21, 2007, in San Francisco, California.

7541\001\VKILEY\1460023.D

Virginia A. Kiley

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